

DISTRICT COURT OF QUEENSLAND

CITATION: *Nowak v Putland* [2011] QDC 259

PARTIES: **JOSEPH NOWAK**
(Plaintiff)

v

PAUL PUTLAND
(Defendant)

FILE NO: 69/2010

PROCEEDING: Trial

ORIGINATING COURT: District Court, Southport

DELIVERED ON: 8 November 2011

DELIVERED AT: Southport

HEARING DATES: 22, 23 February and 5, 6, 7 & 8 September 2011

JUDGE: C F Wall QC

ORDER: Judgment for the plaintiff for \$150,000 plus interest and costs

LEGISLATION: *Defamation Act* 2005, Sections 33,35

CASES: *Bui v Huynh* [2011] QDC 239
Jones v Sutton (2004) 61 NSWLR 614
Doelle v Bedley [2007] QDC 134
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44
Hocken v Morris (2011) QDC 115
Crampton v Nugawela (1996) 41 NSWLR 176
Haertach v Channel 9 Pty Ltd [2010] NSW SC 182
Atholwood v Barrett [2004] QDC 505

CATCHWORDS: Defamation – whether defamatory statements were made – Surf Club – busy night – “You’re a paedophile” – “paedophile” – “You’re a wog” – imputations – defence of triviality – compensatory damages – aggravated damages

COUNSEL: Mr R J Anderson for the plaintiff
Mr P J Roney SC for the defendant

SOLICITORS: Hynes Lawyers (22 & 23 Feb) and Nyst Lawyers (5,6,7 & 8 Sept) for the plaintiff
McDonald Balanda & Associates for the defendant

Introduction

- [1] The plaintiff claims damages, including aggravated damages, for defamation arising from statements the plaintiff says the defendant made to and about him in the sports bar of the Rainbow Bay Surf Club (RBSC) on the evening of Friday 6 February 2009. No claim is made for specific monetary loss, (see T1-18).

The surf club

- [2] It was a busy night at the club.
- [3] On the plaintiff's estimate there were 40 – 50 people in the sports bar which is a relatively small area (T1-30,31,36,37 and the photos ex17). The defendant was drinking at a dry bar with Peter (Ned) Kelly, a retired Victorian solicitor and some other people. The plaintiff's estimate of numbers is consistent with the evidence of Brent Taylor (T4-8), Mr Kelly (T6-3) and the defendant (T5-26).
- [4] The plaintiff was drinking on the balcony with friends. He went inside to get another drink. As he was returning to the balcony he was kicked in the back of the leg. He gave the following evidence of what happened (T1-34,35,37,38,39, T2-94,95,96,98, T3-39,40,41,42,43,48,49,50,51,52,54):

Evidence in Chief

“As I walked past the Keno machine I got a big boot in the back of the – back of the leg here from behind which sort of stumbled me, nearly dropped me, and spilt a bit of my beer. I then turned around in astonishment to see basically Paul Putland abuse me, calling me a paedophile-----

Basically as I turned round he had his hands up, he was yelling, and he yelled it and screamed it in a – oh, a deep, dark tone, he was - he was-----

He goes, ‘You’re a paedophile’, you know, screamed it, yelled it quite loud, which got the attention of a lot of people in that bar, pretty much everyone in the immediate 10 to 15 metre radius, and I said, ‘What are you doing that for? What did you do that for?’, you know, then he just started - he continued screaming that I was a paedophile. He was very erratic-----

Again, can I get you to repeat what occurred, as best you can recall it, so he's said - on the first occasion he's called out, 'You're a paedophile.'? -Yes, indeed.

What did you say to him?-- I said to him, 'I'm not. Why did you do that for, why did you kick me?'

How near to Mr Putland were you?-- I was within a metre distance from him at the time. After he'd kicked me I just turned around and he came towards me, moved sort of a foot, foot and a half towards me, sort of came - lunged at me like he was going to hit me or something like that and he abused me basically said, 'You're a paedophile.' I said, 'No, I'm not.' And then his friend, Peter Kelly, he launched at me and started calling me a paedophile as well, called me a paedophile.

Again, can you - can you - I would like you to repeat the - everything about what was said on the occasion?-- Yeah, he - he basically said, 'You're a paedophile' and basically then Paul said, 'Why would you take photos of my son?' And I said, 'Well you know what's going on with the body corporate situation' and then he's - he's in a real angry manner sort of lunged at me again with his hands up and screamed, 'You're a paedophile' and just started screaming and abusing me basically.

HIS HONOUR: Well, how long - many times did he repeat , 'You're a paedophile.'?-- With - it continued on for probably a few minutes, the situation, so over the whole period he said it numerous times, you know, at least, oh, 15 times, I think, at least, maybe - maybe even more like-----

And was-----?-- -----it was - it was - yeah, so-----

And with what type of voice?-- His - he was yelling, enraged with anger, he had his hands up like he wanted to hit me and was moving towards me. He made a big scene, he had his hands up waving them around and basically made a scene so everyone in the bar stopped at that period of time and looked over at us.

Now, to your observation did people in the room notice what was taking place?-- They did indeed, yes. I actually-----

And what allows you to say that?-- I think on the third instance that he called me a paedophile and he was screaming and throwing his hands around, red in the face, I actually looked around and - you know, in astonishment. I couldn't believe what was going on and there was people on every table there, stopped and looking around. It was - he draw the attention of the whole crowd because he was so vocal and so loud. It wasn't a quiet, little whisper or anything like that. It was very loud. His other mate, Peter Kelly, was joining in as well. He was saying, you know, 'You're a wog.' You know, 'You haven't even got an Australian passport.' Calling me a paedophile as well. So there's two guys going towards me, screaming abuse.

Who called you a wog?-- Peter Kelly did and Mr Putland did call me one as well.

At what point of-----?-- After about the third time he called me a paedophile, he said, 'You're a wog.' Basically then he started just yelling paedophile again. 'Paedophile.' He just started yelling it very loudly.

And over what period of time does this take place? I know it's-----?-- You know, because - yeah, the situation - it was probably about a two to three-minute period, but it may have went for, say, four to five minutes, but - you know, in that period of time was just - time freezes almost in a way, sort of thing. You know - I just couldn't believe it was happening sort of thing.

And who was-----?-- It was probably about a two to three-minute period.

Okay. And that suggests quite a long conversation?-- It was, yeah.

Were you speaking to Mr Putland? Was there an engage of-----?-- I basically said, you know, 'Why would you say that?', and I said, 'You're a sick man.' I said, 'You're a sick man.'

Now, can I ask you, what - when Mr Putland is saying these things to you, what's your reaction? What's your emotional reaction at that time?-- I was disgusted. I couldn't believe that it had occurred. It

was the biggest put down that anybody could be put across. I didn't understand why he was saying it. I even asked him, 'Why would you say that?', and then he spoke the words in relation to filming his son the night before, and I said, 'Well, it's got nothing to do with that. It's to do with the body corporate situation', which then he just continued - you know, basically continued screaming out the words 'paedophile' very loudly.

You've given your evidence already that at one stage you looked around the room, and what did you see?-- I saw people all looking in my direction and looking at me whilst this was going on.

Okay. And if you think back to the person that you saw looking at you, or in your direction when this took place, what was the furthestest person away from you, as best you can recall?-- Oh, probably 15 metres.

And when you looked around the room to realise that people were looking at what was occurring, what did that mean to you? How did you feel when that occurred?-- I felt totally inferior, so small, yeah. Just, like, nothing. Like, felt like dirt, really.

Cross-examination

Now, the first thing that you noticed was that something hit the back of your knee; is that your evidence?-- Yes, it was. Yeah.

But, you didn't see who did that; did you?-- No, I didn't, not until I turned around, no.

But, when you turned around there was no foot sticking out into the back of your knee; was there?-- No, there was guy of front of - like this...turned around at me and walking to - walked towards me, screaming, 'Paedophile', so-----

Mr Nowak, you have not told this Court, on a number of occasions, that Mr Putland was seen by you to have kneed you-----?-- Well, you see when someone's-----

-----and you saw him-----?-- -----foot goes-----

Excuse me?-- -----into your back of your leg, it retracts.

Mr Nowak?-- Yeah.

You have told this Court on a number of occasions that you saw Mr Putland knee you and kick you in the back of your knee. Now, you

didn't see that; did you?-- Well, I felt it and I seen him retract his foot and if -if I can rephrase that, retract his foot. You know when you - you kick someone like that...you've got to bring your foot back down. It was a - it was a high-----

Two questions ago-----?-- It was the height in the back of my knee, so you could-----

Two question ago I suggested to you that you hadn't seen anyone pulling their foot back and you said, 'No, but I saw a bloke standing up with his arms up', or words to that effect?-- Yeah, coming towards me as well, yeah.

Coming towards you?-- You could see someone when they're off foot, when they put their foot down after doing something there's no-one else right next to me in the - in the visual area, so who - who - who would you think it would be? Was it a-----

Well, Mr Nowak's it's not-----?-- -----tree or something [sic].

-----for us to speculate, but apparently it is for you. So, you didn't see who actually kicked you or pushed the back of your knee?-- I turned around and I saw Mr Putland retracting his foot.

How many people were standing next to Mr Putland?-- At that bar there were six or eight people standing on that table.

Right. And they were all in close proximity to where you were?-- They were all behind him. He was on the corner of the bar. I was probably where that guy is with his one form shirt is now walking along. So, they were all on the right-hand side on those tables.

See, I suggest to you, you're just mistaken about whether Mr Putland did that, and that he in fact didn't kick you or knee you in the back of your knee at all?-- Well, there was no-one there for two to three metres, well, you know, two - two metres behind. Mr Putland was there within the immediate metre, half a metre or so. There was no-one in the surrounding area and no-one against the wall.

Do you feel that-----?-- So, it was my leg-----

Mister-----?-- -----that was against the wall, which was my right leg, which was closest to the wall, as I was walking towards the glass doors.

When you were giving your evidence yesterday and earlier today on this issue, why didn't you tell his Honour that you hadn't seen the person kick you, but you did feel something behind your knee and when you turned around you saw Mr Putland retracting his foot? Why didn't you say that?-- Oh, sorry, I didn't, no.

The reason you didn't, I suggest, Mr Nowak, is because you feel, just as you did this morning, that it's necessary to exaggerate or improve your evidence if it helps your case. That's the position?-- I disagree. You've exaggerated your evidence earlier today to suggest that Mr Putland had screamed and yelled at you at the body corporate meeting and you've exaggerated your evidence today to improve it about having seen Mr Putland kick you?-- I disagree.

There was a lot of other noise in that room that night, wasn't there?-- There was a little bit of noise, but the depth and the loud - the way that Mr Putland yelled and screamed at everyone in that vicinity, from anywhere around that bar and in the whole sports bar which you can't see from any of these photos, because you don't actually depict all the tables and seating in it, all stopped and looked, yeah, pretty much.

What I asked you, Mr Nowak, is whether you accept that the people who would have seen and heard the most that night were the ones who were closest to the action?-- Yes, indeed. Yes. Yes, they did, yes.

And I suggest that what he said to you first was, 'What right do you have taking photos of my son in the middle of the night?' He said that in a loud voice?-- No, that wasn't the first - yeah, I think it was more the-----

What was the first thing?-- Sorry, as I understand, it was, yeah, calling me a paedophile and then he said, 'What are you' - 'What right have you got to call my kid this?', sort of thing.

So we understand you correctly, he did say what I just put to you, but he said before that, 'You're a paedophile.'?-- I'm not quite sure just - which way it all went in now, yeah, yeah.

All right. Well, so then you'd accept in light of what you've just told us then that it's possible that the first thing he said to you was, 'What right do you have taking photos of my son in the middle of the night?', and he said it in a loud voice? Do you accept that that may be the first thing he said?-- I - it may well have been, but I'm very sure it led with that paedophile matter and then it went into that what - it was screaming paedophile then it was turning around saying what right. That was the thing, 'What right do you have to photograph my kid?', yeah.

And I suggest to you that he was a bit angry in his voice and in his manner?-- A bit's an understatement, yes, he was angry, yeah, infuriated.

But your evidence that, in effect, he'd lunged at you on more than one occasion as if to hit you with his arms is quite false, that he didn't do any such thing?-- Well the situation-----

No, no, I'm just asking-----?-- Yes, he did, yes.

He raised both arms and put them out in front of him?-- Yeah, raised his hands while he's saying it. He's yelling like this so, yeah.

HIS HONOUR: Well, you felt intimidated?-- Yeah, the way - you know, way he's coming at you, you know, either way you can interpret it as he's going to punch you or he's angry, you know. It's not my - how am I meant to justify that, you know?

MR RONEY: Well, don't. So you accept the possibility that his arms moving was part of this angry and exciting gesturing with his hands rather than actually attacking you with his hands?-- Well, I didn't get - I didn't get physically hit after I got assaulted through the leg, if that's what you're saying, yeah.

No, I'm not saying that?-- Well-----

Could you just listen to my question.

HIS HONOUR: Look, I understood him to say he felt intimidated by what the defendant was doing. That's all.

MR RONEY: Yes.

HIS HONOUR: So what's - I mean, you-----

MR RONEY: Well, there's a difference between his interpretation of something and what he feels and the objective fact, your Honour. I'm trying to - I'm focusing on the objective fact.

HIS HONOUR: Well, I don't follow you. I mean, he's given evidence that the defendant was waving his hands - had his arms up and waving them in front of him and this behaviour intimidated him.

MR RONEY: Yes.

HIS HONOUR: So what's wrong with that? That's all he's saying.

MR RONEY: Well, that's a reference to what he feels.

HIS HONOUR: Yes.

MR RONEY: I'm interested in what happened.

HIS HONOUR: But the defendant's raised his arms in the air and is waving them about and shouting at him. That's as I understood.

Is that right, Mr-----?-- Yes, indeed, yeah.

Yes, and-----?-- Going red in the face, screaming abuse at me.

-----as a result of that conduct by the defendant the plaintiff says he felt intimidated.

MR RONEY: Yes. I'll move on, your Honour.

The events, I suggest, did not involve Mr Putland lunging at you like he was going to hit you at all. I suggest that. You deny that, I imagine?-- Yeah, that - I felt threatened. My personal space-----

You see, this is the dilemma I'm placed in, your Honour.

HIS HONOUR: You felt threatened, all right?-- I feel threatened, yeah, feared for my safety.

So you disagree with what Mr Roney put to you?-- Yeah.

MR RONEY: Well, Mr Nowak, I don't think you are disagreeing with what you put to me because may I just suggest you just said that you interpreted it as intimidating, but from what you've said earlier it may be, you accept, that he was waving his arms about angry and excited rather than with view to lunging at you. Now, are we right in

understanding that?-- He - that's maybe what he felt, but I'm the one being threatened and I didn't see it that way, no.

HIS HONOUR: Do you agree or disagree?-- Yeah, not to king hit me or something to that effect, no, if that's - yeah, I didn't have to block any physical punches or anything like that, if that's what you're saying.

Can I suggest to you or, indeed, put to you that at no time during the events of that evening did Mr Putland as distinct from Mr Kelly call you a paedophile. Comment, please?-- No.

All right, and Mr Kelly certainly used that word, didn't he?-- Mr Kelly called me a wog and said I should get a passport, asked me if I had an Australian passport, yes.

He also said that you were a paedophile?-- Yeah, he joined in, actually, yeah, they joined in, yeah, yeah.

Well, you do see - understand what I'm asking you, Mr Nowak? I'm not asking if he joined in. I'm asking whether he said - that is, Mr Kelly said - you're a paedophile?-- He mentioned it with Paul, yeah. They both - he did say it. Yes, he did.

He didn't mention it with Paul, Mr Nowak, I suggest?-- Yes.

He either said it or he didn't?-- Yes.

Right.

HIS HONOUR: Well, what did he say that you recall?-- He called me a paedophile and he called me a wog and said, you know, 'You wouldn't even have an Australian passport. What are you doing here?', sort of thing.

MR RONEY: And can I suggest that the whole conversation - or the whole incident, from the moment that you stopped and Mr Putland started talking to you, took about 30 seconds?-- No.

How long do you say?-- As I said before, it was a couple of minutes, yeah.

Now, in your evidence last time you told us that Mr Putland called you a paedophile 15 times at least. Do you remember that?-- Yes, yep.

I just want to understand that evidence, though. That's the totality of the number of times that he said 'paedophile' to you?-- It could have been there [sic]. It could have been double that. You know what I mean? It was - it was just said numerous times, constantly, throughout that period of time. Through that, you know, minute or two that we were there, in the situation, I suppose you call it.

A minute or two. So it might have been as little as a minute that it took?-- Yeah, it might have went for two to three. You know, I - in that situation where you're confronted with something so compelling and so bizarre and just - I just freaked out by the whole situation, yeah. It does make you sort of lose track of time within that thing. You get absorbed in the moment, so-----

Mr Nowak, no one's blaming you for that, but it might be that the whole incident took a minute, or it might have taken more; is that your evidence?-- Yeah, I would say it would be over a minute, yeah. Probably about a minute and a half to two minutes, probably.

All right. That's your best estimate now, one to two minutes?-- Well, somewhere through that. It might have been up to three minutes, you know what I mean.

Well, it might have been up to four?-- Well, I don't think it went that long, four to five. It was sort of something between, say, one and three, you know what I mean, and it wasn't just for 30 seconds or 20 seconds, sort of what you're trying to-----

I didn't say that, Mr Nowak. I asked you whether on your evidence that it's possible that it lasted as short as one minute? That's your evidence, isn't it? Or it might have been two or it might have been three?-- I don't think it was as short as a minute, no. I think it was longer than a minute.

All right. And your best estimate of the number of times that he said you were a paedophile is that it was 15, but it might be 30, according to your evidence a moment ago?-- Well, yeah.

Might it be 50?-- I don't think it was that long, no, but it was repeated, you know, quite constantly.

You see, can I suggest to you - I'll withdraw that. Was the way in which he said it to you continuous in the sense of saying, 'You're a paedophile. You're a paedophile. You're a paedophile.', that sort of thing?-- No, he stopped. No, he did stop in between, but he kept bringing it up over that minute and a half or two minutes, through that. So he'd say it for one and then he'd stop for 10, 15 seconds, then go and yell it out and scream it again. That's how it was sort of-----

He would say it and then there would be other things said and then he would say it again and then there would be other things said. Is that the way it happened?-- There was very minimal stuff said other than that, so no. There was very minimal stuff said in between. It was more the paedophile was the main gist of it all. I think the other things we spoke about was what you brought up earlier. There was a mention, you know, why did you film the son or something like that. That's about all he said. So it was more just that paedophile being repeated constantly, yeah.

And did you call him any names?-- I said, 'You're a sick man.' Yeah, I replied, 'You're a sick man.' That's all I said and it was in front of all these - all those other people but - yeah.

I mean, after all, you've told his Honour you were intimidated by this behaviour by Mr Putland, so may we take it that you were concentrating on what he was doing to you?-- Yeah, exactly. Yeah, my concentration was on that, but I did, at times, look or see other peoples' reactions - their faces. Obviously the talking stopped in the area. Everyone went quiet. It went silent, and it was just our conversation that dominated the bar.

Yes. Dominated the bar?-- Yeah.

But you were facing away from the bar. You've told us that?-- Yeah. And that's the short end of the bar that you'd be looking at?-- Yep. It didn't-----

Sorry, can you just listen to my questions and answer them. You could not possibly have seen what was going on behind you on the other side of the bar where the larger part of the bar area is; all the

tables and chairs and so on that are in there. Am I right?-- To an extent because we actually did move, as I said to you, between the two tables there. So the main table you've got in the middle with the guy with the yellow shirt. The whole situation moved between that and the actual table on the left-hand side. So it did move and it actually changed in view. We didn't just sit there going head to head, you know what I mean? I tried to get away and he kept carrying on and it got moved through this whole area here. So it didn't just continue on there. It moved through this whole area here and that's when the people from this table and stuff started coming in. So that's when that sort of - so that, you know, everyone who was standing up here - what, two or three metres away, they obviously heard it and saw it as well.

And even in respect of what - those people who were in there, you weren't paying any attention to what they were doing, were you, when this was going on? You were looking after your own interests?-- I was dealing with the situation, but yeah, obviously saw glimpses of them-----

Glimpses?-- -----at times. You know what I mean, seeing their facial reactions. Seeing everyone stop and look. Noticed the crowds all staring around us, yes. I did turn and have a look at that.”

- [5] See also his evidence at T2-84,85,90,91,92,93,104 and T3-23,24,25,26,27,38,39.
- [6] After the incident was over Brent Taylor approached the plaintiff, told him he'd seen and heard what happened and gave him a Keno ticket with his nickname (Tarj) and phone number written on it - ex2 (T1-69-72).
- [7] Mr Taylor knew both the plaintiff and the defendant. He was more a club acquaintance of the plaintiff than a friend. He said the bar was quite crowded - maybe 20 people in the room plus two or three deep at the bar. He was sitting not far from events. He gave the following evidence (T4-9,10,11,13,14,22,23,24,25,26,27):

Evidence in Chief

“So I first heard the altercation and kind of - and turned around in shock and then witnessed what had actually happened.

Well, what did you hear?

I heard Mr Putland call Mr Nowak a paedophile.

Do you remember any more words than that?-- Look, there was a bit of a slandering - a verbal between - stoush between the two of them and a lot of the F and C words.

MR ANDERSON: You talk about a verbal stoush. Who was using the F word and who was using the C word?-- They both were.

And did you hear Mr Putland use the word 'paedophile' once or more than once?-- I heard it more than once.

Do you recall how many?-- I first heard it and then turned around and saw it.

I'm sorry, you heard it first with your back to him-----?-- I heard it first with my back to it, and with that got up and turned around to see who and what was going on, and then saw it a - a number of times, maybe twice.

You saw Mr Putland use those words-----?-- Yes.

Again, do you recall the context in which it's being said? Do you recall anything about the conversation that's taking place in which the word is being used?-- No, I don't recall any of that conversation. There's a little bit of noise going on in this area, so that part of the conversation was background noise. It wasn't until I heard the - the 'paedophile' words that I was able to distinguish what was said and what was going on.

And when you turned around and were able to see who was involved, who did you see?-- Joseph and - and - and Mr Putland.

And where were they standing having regard to the photograph that's in front of you?-- Joseph was probably about - he was standing where this gentleman is in the yellow shirt.

Yes?-- And Paul would have been at the table along from that.

Okay. Was he seated or standing?-- He was - by that point he was standing.

And, to your observation, was there anybody else involved?-- I can't - I can't honestly answer that. I - like I say, I can't even recall the number of people that were at Paul's table and who was there.

You're aware of there being more than one person?-- I was aware of there being more than one, yes.

And what did you then do, having heard this, did you do or say anything yourself?-- I - I kind of inter - well, not intervened, but I just, you know, as you do, just try and calm the situation down.

And how did you do that?-- And I grabbed Joe and brought him over to my table and sat him with me and we - we proceeded to have a conversation about what had gone on and what have you.

MR ANDERSON: If you think about the expression that he used, how his words came out, how does that compare?-- The expression and the words, they were quite venomous.

Did you hear anything other than the word 'paedophile' that adds to this notion of venomous?-- No, I can only honestly say I heard the word 'paedophile'.

HIS HONOUR: At what volume?-- Well, it caught my attention, and as I say, what was being said between the two of them and what had gone on at the table was like morphed into all the noise of the club. It was the loudness of the 'paedophile' word that I - that caught my ear and alerted me to turn around to see what was going on.

MR ANDERSON: Was Mr Putland gesticulating in any way?-- Sorry, meaning?

Was he waving his arms around? Was he moving his body?-- No. I wouldn't say he was - not physically aggressive, no.

When you took him to your table and you spoke with him, how was his demeanour then?-- He was quite unsettled by it all.

MR ANDERSON: Mr Taylor, from when your attention was caught, to the point in time when you sat down with Mr Nowak-----?-- Yes.

-----what kind of period of time are we looking at?-- Sorry?

From the moment your attention was caught by what you heard-----?-
- Yes.

-----to - through what you saw and what you did and then you sat down with Mr Nowak, how long did that take?-- Oh, five minutes.

Now, you spoke to Mr Nowak when you were sitting at the table?-- Yes.

And do you recognise that document that you've just been given?--

Yes, I do. It's a Keno ticket with my name, my phone number and my handwriting.

Why did you write your name and phone number on the Keno ticket?-- I just - at that point I just handed it to Joey in case he needed any assistance with what had gone on. He - like I say, he was quite unsettled and disturbed by the whole action.

And did you say to him that you would come to Court to assist him?--

- I said if he needed a witness, that I would - I would give him a written account of what I saw happen that afternoon.

Cross-examination

So when you told his Honour that this took about five minutes, you must have watched most if not all of that five-minutes worth of activity?-- Well, I was - well, I don't think I would have stared or glared at it. It was just kind of - well, you know, I didn't want to become a part of it.

We understand that, but what I'm trying to ascertain is whether you were looking at what was going on, or were you looking away?--

No, I was looking at what was going on.

So if Mr Putland moved at any stage during those five minutes, you would have seen that?-- Yes, yes.

And if they got into a position where they were close to each other and Mr Putland was standing over and waving his arms, or his fists in an overbearing way toward Mr Nowak, there's no doubt that you would have seen that?-- That's correct, yes.

And that certainly didn't happen, did it?-- No, no.

Do you agree?-- I agree.

You did tell my learned friend in response to a question that Mr Putland wasn't physically aggressive and wasn't waving his arms

around and so on. So was the thing that drew your attention to all of this just the use of the word 'paedophile'?-- Yes.

And this wasn't being shouted, was it?-- It was above the regular crowd noise there.

Yes. But it wasn't being shouted?-- Shouting as in yelling, no, but it was-----

It was loud-----?-- I certainly heard it and I was aware of what had been said.

It was louder than ordinary conversational level?-- Yes.

But not particularly loud?-- No, it was louder than the normal conversation level, but not yelling.

All right. Now, would it be right to say that you were only a few metres away from all of this going on?-- Yes, it would be fair to say that. Judging that, I would have - maximum 4 metres from it all.

And do we understand your evidence to be that you couldn't really discern anything else that was being said between them apart from being able to hear the word 'paedophile' being used?-- Yes, that's correct.

HIS HONOUR: And he said the F-ing and C-----

MR RONEY: Oh, yes, he did, thank you, your Honour, for reminding me. You heard the swearing - I will come to the swearing - but you couldn't actually hear the content of any discussion that might have taken place between them?-- No.

Agree?-- Agree.

All right. But you also heard some swearing - I won't go over the words used - but both of them were swearing, is that your evidence?-- That's - that's my hearing evidence, yes, I can't - I didn't see this, I heard it.

All right. So when was the swearing relative to the first time you heard the word 'paedophile' used?-- It came after the words 'paedophile' were used.

And - and from your evidence Mr Nowak was using this language?-- Yes.

And Mr Putland also?-- Yes.

Could you be mistaken about that, as to whether there was this swearing going on?-- No, I couldn't be mistaken; no.

The - and may we take it that the reason you could hear the swearing is because it was also spoken at the same volume as this 'paedophile' word was being used?-- Yes, yes, yes, it would have been. Well, I heard it above the day-to-day noise or the hum of the noise that one hears-----

HIS HONOUR: The club noise, above the club noise?-- Yeah, above the club noise, that's correct.

Now, you've not told us about any context in which you heard this word 'paedophile' used in a sentence? Do you know what I mean by that? You haven't told us that the word 'paedophile' was in some particular sentence or in some context-----?-- In a sentence?

Is it the case that you didn't hear the context in which that word was used?-- No, I - I heard it used in an aggressive context.

Well, I'm not asking you about tone or volume now, I'm asking about the words around it, do you understand what I'm saying? I'm asking you what sentence was it used in or if you can say what you heard was the sentence in which it was used?-- Yes, I heard the word used in a sentence that went along the lines of, 'You're a paedophile.'

All right. Anything else?-- No.

There's no possibility, is there, that the word 'paedophile' was used, at least as far as you heard it, 10, 20 or 30 times?-- It was used repetitively, yes. How many times? I wasn't counting.

Right. Just excuse me a moment, your Honour? Isn't it your evidence that you heard it three times all up, once when you weren't looking at the incident and then two other times?--

There's - my evidence?

That's what you told us in your evidence-in-chief when Mr Anderson was asking you questions?-- Well, I heard it a number of occasions. I don't think I quoted a number. Several times. What's several? Any more than two so-----

Well, several isn't 10, is it?-- No, several is not 10.

So, just so that we understand your evidence though, what you heard was the use of the word 'paedophile' two or three times?-- On a number - no, it would have been more than two or three times - I - I--

Well, how many?-- Oh, look, I wasn't counting.

I know you weren't counting. We're asking you to give evidence of what you heard that day?

HIS HONOUR: Yeah, but I think he is-----?-- The evidence I'm giving is that I heard the word "paedophile". I'm sorry, I don't stand there and count how many times I've heard a word.

MR RONEY: Doing the best you can with what you recall that evening, would it have been more than four times?-- No, I can't answer that, I can't answer that.

In any event, as I've understood your evidence, and my note of it is this that, when you heard for the first time the word 'paedophile' being used, you moved over immediately and tried to calm the situation down?-- That's correct.

So may we take it that you were in much closer proximity to what was taking place than when you first heard the word 'paedophile' used?-- No. I - like I say, you know, we're talking - when you're talking proximity, we're talking about 3, 3 and a half metres here from where I had my back to it as to when I heard the word for the first time. I didn't take any note of how many times it was said, all I was interested in doing was sort of calming and quelching the incident.

But what I asked you was whether when you moved over immediately after hearing 'paedophile' used for the first time you were much closer to the action than when you were sitting at the dry bar-----?-- First heard it, yes, sorry, yes, I was.

So you must have been able to hear a lot more of what was being said at that time?-- Look, I've got to be honest with you, I wasn't taking a lot of notice of what was being said. I - I - it was the words 'paedophile' and I heard them on a number of occasions. I didn't count the occasions or the number I heard them, but, you know, it's more about just calming the situation down and, 'Come on, let's just -

we're here to be - you know, this is a social - social aspect of the club.'-----

So-----?-- -----I don't like aggression-----

Yes. And so how long did it take you before you were able to get Mr Nowak to come back with you to the table?-- Oh, Mr Nowak was quite happy to come back and sit at the table.

And so immediately?-- Pretty much so, yes.

So is this the way that it happened: you heard the word 'paedophile' and you turned around?-- Yes.

Then you got up from your chair and you walked across to where Mr Nowak and Mr Putland put were?-- Yes.

And you said immediately to Mr Nowak, 'Come on, come with me, settle it down' and he came with you?-- Yes.

All right. Now, you've told his Honour that the whole incident took five minutes?-- Yes.

And we appreciate that time can be a strange thing in these situations, but, what from you've just told us happened, the incident involving the use of the word 'paedophile' must have only taken a few seconds before you intervened?-- Yes.

So is the truth of the matter that the whole incident involving calling Mr Nowak a 'paedophile' really only took a few seconds before you stepped in?-- From when I heard it, yes.

Yes, from when you heard - first heard the word 'paedophile'-----?-- I can't answer about what happened previously to that, but-----

Of course. So a few seconds passed between when you first heard the word "paedophile" used and when you intervened and took Mr Nowak away back to your table?-- Yes.

Did - did Mr Putland show signs of being upset?-- I don't know about upset, maybe aggressive.

Well, you told his Honour before that he wasn't physically aggressive?-- No, he wasn't physically aggressive, but, you know, you can see aggression in an expression.

Well, so you're telling us now that you saw his expression, did you?-- Yeah."

- [8] Mr Taylor was recalled and it was put to him in further cross-examination that he was mistaken in saying it was the defendant as opposed to Peter Kelly who used the word "paedophile". His response was (T4-66,67):

"Oh, mate, no, no. 'Cause I - I'm sorry, I know Mr Putland's voice from - it came from behind me and when I turned the - the - the - the paedophile abuse continued on. And, that came from Mr Putland's voice.

Yes. Did you - you know Mr Kelly?-- Yeah, I know him.

And, he was involved in the incident, wasn't he?-- Like I said, I honestly can't remember who was at Mr Putland's table.

Do you know Mr Kelly's voice?-- Sorry?

Sorry, do you know Mr - Mr Kelly's voice? Are you familiar with his voice-----?-- Yes, I do. I've known - I've known Ned around the club for a number of years.

All right. If I were to suggest to you that in the course of that altercation that day Mr Kelly called Mr Nowak a paedophile and also called him a wog, or a name like that, would you disagree with that?-- To be honest, I - I can't say I heard the word wog.

All right. You don't disagree with it, but you can't say whether it happened or not?-- No, I can't - I can't give a definite answer on that.

All right. Just-----

HIS HONOUR: Mr Taylor, do you - by that do you mean that Mr Kelly may have used the word paedophile or you don't know?-- Once again I - I heard the word paedophile and turned and saw it coming from Mr Putland.

Yes?-- Maybe Mr Kelly was the first one to say it. But, I actually heard it and I know - I know Mr Putland's voice quite well-----

And, did you-----?-- -----and - and Mr Kelly's and I would have to say that it would've been Mr Putland's voice.

And-----?-- And, then I saw him actually saying it.

Okay. Thank you-----?-- I - I'm not sure what involvement Mr Kelly had in this. I honestly have to say I can't even remember [indistinct] being there.

MR RONEY: Do you recall Mr Putland saying words to the effect to Mr Nowak that night that he was upset about the fact that photographs had been taken of your son in the middle of the night and that he couldn't do this kind of thing?-- No. I don't recall any of that. I - I have no recollection of that being said.

Re-examination

MR ANDERSON:

As I understood it, you were saying that Mr - you had no recollection of Mr Kelly being there?-- No, I don't have any recollection of Mr Kelly being there.

Do you think that if Mr Kelly had been there - excuse me - you would remember it, given you know him?-- Like, you know, the thing is it all happened so quick and it was all a bit obnoxious and I - you know, personally, I was quite disgusted in what had [indistinct] had. I think if - I know Ned quite well and I think if I'd have known he was there or seen him there I would've remembered. But, like I say, I - I can't actually state that I definitely saw Ned [indistinct] or didn't see him there.”

- [9] The defendant's version of events at the RBSC was quite different to that of the plaintiff and Mr Taylor. He said (T5-25,26):

Evidence in Chief

“Well, I was standing at a dry table near the Keno section where they sold the Keno, and Mr Nowak walked - I was standing there with my back to the Keno section, and he walked behind me and around to just on the corner of the bar.

Right. Go on?-- And he went there and Stewart Ball was there. He was talking to him. And I saw him over there and I was probably - he'd been there for about a minute. I said - I said to Peter, I said, 'I'm going to tell this fellow that he can't go around taking photos of me son.', and Peter said - Peter said, 'Let it go. Don't do anything.', and I said, 'I'm sorry, I'm going.' So I went over and I said, 'Hey, you. What do you think you're doing taking photos of my son in the middle of the night?', and he looked at me and he said, 'I can do what I like. I'm getting proof for the council.', and then I said back

to him something like, 'You can't go around in the middle of the night taking photos of under-age children. He's only a minor.', and then I - I sort of turned around and was walking back and Peter Kelly started saying things to him. I didn't hear what Peter was saying. I was a little bit agitated, and then about 30 seconds later Peter came back and that was it.

Did you hear anything that Mr Kelly said?-- No, nothing - well, I - no, not really."

- [10] He denied kicking the defendant, being physically aggressive towards him (T5-26,27) or calling him a paedophile and a wog (T5-88).
- [11] Mr Kelly has no recollection of seeing Mr Taylor that night. As far as he is aware Mr Taylor "played no part in the incident" involving the plaintiff and the defendant (T6-5). As to the incident he said (T6-5,6,7,15,16):

Evidence in Chief

"So could I then take you, please, to that incident, and could you tell us, please, how it happened, as you recollect it?-- Well, my recollection is that I'm standing there having a beer, I drove up there to have a beer, which I always do, and the place - sort of just depends who's there, who you end up with, like, sometimes you might be three or four of you, might - sometimes there might be 50 from the surf club. So, anyway, this particular moment I looked across, and I was drinking, Mr Putland was there, along with several other people, and I looked across to the bar area and I saw Mr Nowak just looking towards us with a big grin on his face, and Mr Putland saw that too, he was making it obvious, but he was grinning at us. So the next thing I said to Mr Putland, 'Don't - let it go, don't worry about it, he's trying to egg us on or egg you on, or whatever.'

What was the last comment?-- 'Egg you on' or me on or something, but he was - he was - this big cheesy grin almost like he'd sort of, you know, was on something, I don't know, but just this perpetual - it went on for, you know, a couple of minutes, this big - looking at us, and I said nothing - you know, I said, 'Don't do anything', and with that he went over, Mr Putland, and I followed him over towards Mr Nowak, which was near the end of the bar there, and he said-----

'He' is who?-- He, as in Putland, said, 'You know, leave my son alone, stop taking photos of my son', which apparently happened the night before, I was told by Mr Putland at that meeting at the pub [sic], before I saw Mr Nowak, and I was probably incensed myself, like I thought, well, a young kid getting taken photos in the - while he's asleep by two, you know, two mature men, I suppose, in inverted commas, and so I - I had a bit of a crack at Mr Nowak as well.

Right. Well, before we deal with what you said, can you tell us what volume and in what tone Mr Putland said what he said?-- Well, he just sort of - he's not a volatile sort of loud person, but he just sort of said in a normal tone, 'Just leave my son alone. Stop taking photos of him.'

Now, the way you've just done it, if I can correctly identify it, sounds a little stern?-- Oh, he was certainly stern.

All right. Now, was anything you saw in the behaviour of Mr Putland aggressive toward Mr Nowak?-- What, physically aggressive?

Yes?-- No.

HIS HONOUR: Verbally aggressive?-- Yeah, well, he's - yes, I suppose you'd say, you know, he said that, 'Leave my son alone' - well, I think I was more verbally aggressive than he was.

MR RONEY: All right. We'll just deal with Mr Putland first-----?-- Yeah, sure-----

-----and then we'll deal with you? Well, what do you say to the suggestion that Mr Putland, at some point prior to any conversation between them, kicked or pushed his foot into the back of Mr Nowak's leg or knee?-- Absolute nonsense.

Now, how many times did Mr Putland say words to the effect that you've said about leaving his son alone and not taking photographs of him-----?-- I'd be guessing, it was - I don't - maybe three or four times, but I was talking to - to - to Mr Nowak at that time as well.

So it was as if both of you were having-----?-- Yeah.

-----two bob's worth with Mr Nowak-----?-- Yeah.

-----at the same time?-- And I was still talking to Mr Nowak and Mr Putland had gone back to the table.

All right. Did you say anything to Mr Nowak while Putland was still there?-- Yes, I did; yeah.

Do you recall what that was?-- I think I called him a P-R-I-C-K.

HIS HONOUR: A what? What, you can say it?-- Oh, a prick, and I - I recall telling him to get a passport, and the reason I told him to get a passport was so he could get out of young Danny's life so he can get on with his schooling, stop annoying him and banging on his doors and taking photos of the kid.

MR RONEY: Did you at any stage call him a wog?-- I think I did, I regret that, but I think I did.

At any time did Mr Putland, in your presence, or did you hear at all that evening Mr Putland call Mr Nowak a paedophile?--

No.

Is there any possibility that that could have been said and you not hear it?-- Well, I was in - in range, and I - I can't see any possibility, no.

Cross-examination

MR ANDERSON: And - but what you are obviously enough aware of is that the confrontation was initiated by yourself and Mr Putland?-- Yes.

You both approached him?-- Yes.

You were both agitated?-- Yes.

You were both angry?-- Yes.

And you both - that is, together in a concerted way – verbally attacked Mr Nowak?-- Yes.”

The “hate campaign”

- [12] Of relevance to an assessment of credit as well as the claim for aggravated damages is the evidence about what has been referred to as the four “hate campaign” incidents particularised in para 15(e) of the Third Further Amended Statement of Claim. These are said to have occurred after the RBSC statements.

(1) Para 15 (e)(i) – 7 February 2009

- [13] The plaintiff gave evidence that the defendant said to the plaintiff's father in the presence of Paul Graham and Bernard Kermond "Your son's a paedophile. What's he doing filming my son?" (T1-42, 3-58). "What are you - you paedophile - what - your son's a paedophile" (T1-42).
- [14] It was put to the plaintiff in cross-examination (T3-60) that at no stage did the defendant call him a paedophile. He disagreed.
- [15] The defendant's evidence is that he did not use that word. He said he was with his son Danny. He said no-one used the word in this encounter (T5-29,30,85,91,92). The incident is not recorded in ex1.
- [16] The plaintiff's account (and that of his witnesses) is a little different to that pleaded but is in my view nothing of significance turns on this.
- [17] The defendant's use of the word "paedophile" in reference to the plaintiff is supported by three witnesses who were present with the plaintiff.
- [18] Paul Graham said the defendant was with his son. His son called the plaintiff a paedophile and the defendant made a similar statement (T3-98). Both used the word (T3-102). He disagreed with the suggestion put to him in cross-examination that he was mistaken when he said the defendant referred to the "actions of a paedophile" (T3-109).
- [19] Bernard Kermond said he heard the defendant's son say "Paedophile", "You know that's the reason he come to me door [sic] or "Paedophile that's why you're up to my door" or "going up to my door", and then the defendant say "Yes you paedophile" or "Yes you're a paedophile" (T4-33,34,43,44). Both statements were directed to the plaintiff (T4-34,40,41). He also disagreed with the suggestion put to him in cross-examination that he was entirely mistaken about whether he heard the word "paedophile" and that his recollection of events is "all based on what he suppose happened" (T4-46).
- [20] Joseph Nowak, the plaintiff's father, said that as soon as the defendant and his son saw the plaintiff they started calling him a "paedophile"; the defendant kept calling him a paedophile saying "You're a paedophile, you're a paedophile" (T4-69,70).

He also disagreed with the suggestion that neither the defendant's son, nor the defendant used the word "paedophile" (T4-91).

[21] Danny Putland, the defendant's son, was not called to give evidence.

(2) Para 15 (e)(ii) – 24 November 2009

[22] Only the plaintiff and the defendant were present. The plaintiff said the defendant was gardening and yelled at the plaintiff three times "You're a paedophile". The plaintiff walked on. On returning the defendant yelled the same three or four times (T1-47; 3-62). In cross-examination he agreed the defendant also called him a "fucking cunt", a "loser" and said the plaintiff had to pay for a lawyer and called him a 'paedophile" (T3-63). This additional conversation is referred to in the plaintiff's contemporaneous diary note, ex21 and I am not prepared to criticise him for not mentioning it when he gave his initial evidence. It was put to him in cross-examination that no such incident occurred (T3-65) and the defendant said it "never happened", "nothing happened there, never" (T5-32,42).

[23] The defendant's denial follows his denials in relation to the incident at RBSC and the incident on 7 February 2009.

(3) Para 15 (e)(iii) – 6 February 2010

[24] Notwithstanding the plaintiff's pleading the plaintiff said only he and the defendant were present. He said that the defendant yelled at him from his balcony that he was a paedophile. The plaintiff saw no-one else around on this occasion (T1-47,48).

[25] It was put to the plaintiff in cross-examination (T3-74,75) that Mrs Putland was with the defendant (see also ex27 para 186) and that the defendant did not call the plaintiff a paedophile; the plaintiff disagreed. In evidence the defendant said the incident complained of was "ludicrous" and "just never - never happened", he also referred to "us" on the balcony but didn't identify the other person (T5-33); presumably it was Mrs Putland. She was not called to give evidence and I think I can infer that she would not have assisted the defendant.

(4) Para 15 (e)(iv) – 16 February 2009

[26] In addition to the plaintiff and defendant others were present and, in my view, the issue in relation to the one who was called for the defence (Mr Jack Boniface who

chaired the meeting) is whether the words complained of were in fact said and said loudly enough to be heard by him.

- [27] The plaintiff said (T1-42,43) nine people were at the meeting all seated in a “semi circle like situation within a 3 - 4 metre radius”. The defendant sat next to the plaintiff on the left. During the meeting the plaintiff said the defendant called him a wanker and a paedophile. He then gave this evidence (T1-43):

Evidence in Chief

“MR ANDERSON: And how did he do that?-- He would turn to me-----

In what language and in what tone of voice and in what context did he say that to you?-- He would just say it. He wouldn't actually scream or yell it. He just turned over towards me and go, "You're a wanker." You know, "You're a paedophile." He did it numerous times throughout the situation, so it was probably on a 15 to 20-minute interval, constantly through the meeting he continued doing that.

Was it part of a conversation between the two of you?-- No, there was no conversation between us. It was just through the meeting, or if I actually spoke to the chairman in relation to a matter or anything, that's the comment that I'd get thrown at me.

And what did you do in response?-- Said nothing. Nothing in response.

And can you - can you replicate the volume of Mr Putland's voice when he's saying these things to you?-- It was like, "You're a wanker." That's basically it, yeah. "You're a paedophile." That was to the extent of it. So it could be heard by the rest of the meeting, quite easily.

Was he doing it while other people were speaking?-- At times he did it. At times he'd wait until I'd finished speaking and then he'd say it.”

- [28] In cross-examination he said (T1-93, T2-51,52,53):

“And you say that at this meeting of the 16th of February, Mr Putland repeatedly called you a paedophile whilst everyone else was there?-- Yes, indeed. Yes.

Right. And he repeatedly called you a wanker whilst everyone else was there?-- Yes, indeed.

Right. And he did so quite loudly?-- He did it at a speaking-----

HIS HONOUR: Conversationally?-- -----a normal speaking conversation level, yeah. So it wasn't very hugely loud. Yeah. He wasn't screaming or yelling or loud in that respect. No.

Whatever Mrs Boniface was saying on the issue, and whatever Mr Boniface was saying on the issue of the screaming girl in your unit, it was being said in a public discussion amongst all of those who were present at the meeting, wasn't it?--

Yes, it was, yeah.

Right. Whereas anything that Mr Putland said to you in the meeting was said as if just to you?-- It was said within the meeting, yeah.

But said as if for you to hear?-- It wasn't recorded in the minutes.

Well, they weren't actually calling me a paedophile. They spoke about a situation which occurred. They weren't yelling or screaming at - you know, saying paedophile - not yelling - saying it. To that effect.

Mr Nowak, you didn't tell us yesterday that my client was yelling and screaming and calling you a paedophile and a wanker in that meeting, did you?-- Not yelling and screaming, no.

Well, why did you just say it then?-- No, I take that back. He actually spoke it. He spoke it then.

So you were exaggerating a moment ago when you said he was yelling and screaming at the meeting?-- That was - yeah, that a second ago was an exaggeration, yes.

And why did you feel the need to exaggerate that?-- I - yeah.

My question was actually-----?-- It was basically because these people weren't labelling that situation towards me.

But they were, Mr Nowak, because you've told us already that what Mrs Boniface was saying was offensive to you. Because it was labelling you, wasn't it?-- Well, it was offensive - offensive things to say to people. She didn't actually explicitly say those words, or that situation, but-----

But that's the way you took it; that she was talking about you, and it was offensive?-- Well, it's an offensive thing to say to anyone I think in that context; if you've got someone saying that you're a paedophile sitting next to you.

The question that I asked you wasn't about what my client did. My question was directed to what Mrs Boniface did. You do understand that, don't you?-- Yes.

Right. The question a moment ago, though, which I haven't yet got an answer to, was was it the case that what my client was saying to you in that meeting was said as if just for you to hear? That is, quietly and to you?-- No. It was to the meeting, basically. Yeah, the meeting could have all heard it. We were all sitting around very closely and it was said at this level.

And what was the topic of discussion at the time when he was saying this?-- It occurred continuously throughout the meeting, at various intervals. I couldn't recall exact - exactly what topic is - was spoken about at the time.

The meeting, according to the minutes, closed at 11 o'clock, so it went for about 55 minutes. Does that accord with your recollection?-- Yeah.

So are you suggesting that more or less continuously for 55 minutes my client was audibly - that is audibly for everyone in this meeting to hear - calling you a paedophile?-- Not throughout the whole time, no. It was said probably three or four times throughout the meeting.

Throughout. Well, was it said all pretty much-----?-- In intervals of 15 minutes. It wasn't all said at the one time. It was spread out throughout the meeting on various times.

And at no stage was the topic of discussion at that time about the girl; is that what you're saying?-- It may well have been. I don't recall exactly when it was said, no. I couldn't tell you, but it was said-----

You don't recall whether it was said?-- It was said in, say, 15-minute intervals throughout that meeting.

Well, Mr Nowak, I suggest to you that the discussion at that meeting that day about the girl and the suggestion, if not express, at least implied, that you had done something improper with this girl, came from Mr and Mrs Boniface and not from my client, Mr Putland. What do you say to that?-- That was a suggestion they'd put - put in there, yeah. There was a suggestion there, yes. From these people as well, yeah.

Do you understand the proposition I'm putting to you? The proposition I'm putting to you is that those who inferred or implied that you were, if you like, a paedophile - they may not have used those words - but the persons who implied that at that meeting were Mr and Mrs Boniface and not Mr Putland?-- They'd implied that a person had been screaming.

HIS HONOUR: No, no, no, no. What is being put to you is that Mr Putland didn't say you're a paedophile, Mr and Mrs Boniface did, or they implied that?-- Mr Putland did say that, so, yeah.

Well, just listen to the question?-- Yes, no, that - no, that's----- Well, you weren't listening to the question?-- Sorry.

MR RONEY: But it's true to say that Mr and Mrs Boniface, as you understood it, did imply that you were a paedophile?-- Well, if - from that reading, yes.

No, forget the reading. I'm asking about what you recall happened.

HIS HONOUR: I think he - I don't think he has a recollection, other than the minutes, Mr Roney. Is that so?-- Yeah, it's a rough thing with the minutes. So it's hard to recollect something that I don't remember, like, yesterday, you know? Like I do with the surf club incident.

MR RONEY: When you came to Court yesterday to tell us about what happened at this meeting, you hadn't read the minutes of the meeting before coming in to give your evidence, did you?-- No, I hadn't read those.

So what you were telling us yesterday in your evidence-in-chief, when Mr Anderson was asking you questions, was what you recalled happened?-- Yes, as well as from my notes that I'd written.

From your notes, right. All right. Well, I put it to you that, in fact, Mr Putland didn't call you a paedophile at that meeting. Nor did he

call you a wanker in that meeting of the 16th. You disagree with that?-- Yeah, I disagree with that. Totally disagree with that.”

[29] Mr Roney returned to the subject at the resumed hearing on 5 September 2011 (T3-78,79:

“Now, you told us and you told Mr Anderson in response to his questions and some of the questions I asked as well, about you being called a paedophile that day by Mr Putland. Do you remember that?--

- Yes.

And you - I'll rephrase that. You told the Court that my client was using a normal conversational level of voice when he said these things to you during the meeting, so that everyone could clearly hear it. That's your evidence, isn't it?-- Yeah.

And there's no doubt, is there, whatsoever, in your mind, that at the volume he was speaking in the small space which you call the vestibule, that all of the other people at this meeting would have heard it?-- They should of. I heard it quite loud and clear, so----- Well, this was a very quiet space, wasn't it?-- Yeah.

There was no other noise?-- Yep. The only - the only area that might have doubted it was if someone was talking at the time when he said things, so that might have been the only dampening factor where people may well have not heard it, because he's saying it when people are talking.

You told us that he said it a number of times - words to the effect that it was, you know, every 15 minutes or so in the course of this hour-long meeting. Now, is that accurate?-- Yeah.

Now, there were - I just don't recall exactly - but five or six people in this small space - yes? You'll have to say yes or no?-- Oh, yes.

And really you wouldn't suggest, would you, that there wouldn't have been at least one person in there who would have heard it, if it was said?-- Well, I should think people - people would hear it, but as we all understand, that's beyond my control, isn't it?”

[30] In his notes of this meeting, ex1, the plaintiff recorded:

“Paul – called me a petaphyle [sic] (child molester) in meeting when brought up. Defamatory comments in prior meeting – (in the middle in front of the whole meeting”).

The words “wanker etc” were added later immediately after the last word “... meeting”.

[31] In evidence the defendant said (T5-37,78,79) that Julie Brown sat between him and the plaintiff and he denied calling the plaintiff a paedophile. He also gave this evidence (T5-37,79):

Examination in Chief

“And you've heard Mr Nowak say that every 15 minutes, in the course of this meeting and a number of times, you said to him or said in an audible voice, so that everyone could hear, that he was a paedophile. Can you comment on that?-- I didn't say that in the meeting at all, no. That's false.

And that during the course of the meeting you called him a paedophile?-- Not true.”

[32] Mr Boniface gave this evidence (T6-40):

Examination in Chief

“Now, during the meeting, there were a number of agenda items dealt with?-- Yes.

We won't go through those, but can you say, at any stage in the course of that meeting, did Mr Putland call Mr Nowak a paedophile?-- **Not to my recollection** he certainly did not call him a paedophile.

Did any other person there refer to him as a paedophile in that meeting?-- **Not to my recollection.**

Do you remember where people were sitting relative to each other? From what you've told us is it right to say that people were sitting on chairs, that you were the only one with the table then?-- My wife, who is the secretary, was at the other side of the table-----

Yes?-- -----on the left-hand side. Oh, it's probably not all that accurate, but I think on the right-hand side down the wall there was

probably Trish Witham, the Putlands, then I think the Browns, then Joseph Nowak.

So does that mean that Mr Putland wasn't sitting next to Mr Nowak?-

- **Not to my recollection.**”

[33] The highlighting is mine.

[34] During discussion on the first day of the trial about the relevance of certain questions, Mr Roney SC said that his case was that at this meeting “there was discussion at which others, not my client, accused Mr Nowak of being a paedophile” and “about this girl in the plaintiff’s flat and what this meant, and that it didn’t involve my client accusing him of being a paedophile but that others were expressly or impliedly putting that to him” (T1-94,96). Neither the defendant nor Mr Boniface gave evidence that others at the meeting accused the plaintiff of being a paedophile.

Findings

[35] The plaintiff was quietly spoken and seemed to have a non-aggressive nature. He was extremely frustrated with the body corporate, the committee and some other unit owners and they with him. The relationship between both sides was not harmonious, on the contrary it was at times fractious, argumentative, accusatory, unpleasant, annoying, frustrating and irritating but was not such as to mean he would fabricate events and statements and I am satisfied he did not. I accept him when says that the predominant cause of his anguish is the statements made by the defendant, not his dispute with the body corporate and other owners. In this respect I also agree with the submission of Mr Anderson (ex28, para 22) that the defendant was trying to get the plaintiff out of his life.

[36] The plaintiff expressed his frustration at one point in the evidence he gave from T2-76 line 50 – T2-78 line 10 which I accept and I need not repeat here. In this respect I also accept the submissions of Mr Anderson, ex 28, paras 33-36.

[37] Mr Roney conceded the background of a “continuous and longstanding dispute with the body corporate” (ex27).

[38] Generally the plaintiff seemed to have a pretty good recollection of events but on occasions he tended to exaggerate things but that is understandable given what was said and the effect it had upon him. In my view he was a truthful witness. He was

inclined to try and second guess reasons behind questions asked in cross-examination. In some respects he was not a particularly good historian and at times he was a little frustrating in the way he answered questions and explained things but that is probably understandable because of the heated and surprising nature of the confrontation at the RBSC and what was said then and on other occasions and its upsetting and unsettling effect on him. The allegations made by the defendant were still clearly affecting him when he was giving evidence. Sometimes his recollection was such that it required reminding, in the form of a specific rather than a general question, for him to focus more particularly on a particular subject or question.

[39] In relation to his cocaine conviction and his use of the drug, I accept his explanation that he was going through a lot of stress in relation to this case and it was “a release in a heavy situation like this” (T3-91,92,93). In these circumstances I do not accept the submission of Mr Roney (ex27, para 153) that the plaintiff is “not a person of integrity”. I am satisfied that he is. His evidence is supported by others, as is his reputation.

[40] These are not reasons to doubt his evidence which in overall terms was quite consistent and, where possible, supported by the other witnesses or not contradicted by others the defendant said were present but who were not called to give evidence.

[41] Generally I accept the plaintiff’s account of what was said at RBSC and in the hate campaign incidents. His evidence about RBSC is in a significant and sufficient respect supported by the evidence of Brent Taylor.

[42] I do have some reservations about his evidence as to the number of times the defendant called him a paedophile at RBSC, how long the incident lasted and how loudly the defendant was speaking to him at the meeting on 16 February 2009.

[43] I accept his evidence that the defendant kicked him as he described.

[44] With perhaps understandable but not significant differences the plaintiff’s evidence is consistent with the contemporaneous (T2-57 and T3-26) notes he made, ex1. He there recorded the RBSC incident in the following terms:

“Rainbow SLSC 7pm. 8pm kicked in the back of the kneecaps by Paul Putland. Called a pedophile [sic] (Paul and Ned Kelly neighbour 10 or 12 Boundary St) Shouted and made a large scene.

NK calling me a wog and asked if I have an OZ passport. I replied you are a sick man.”

[45] It is also consistent with what he said in his Application for an Apprehended Personal Violence Order filed on 23 April 2009, ex20 as follows:

“6-2-09, 7-8pm I was kicked by Paul Putland in the back of my leg. He then yelled and screamed verbal abuse at me. He made a big scene and up to 30 times loudly called me a pedophile [sic]. His mate he drinks with from (10 Boundary St, Tweed Heads, west lower side level) encouraged Paul Putland and numerous times called me a pedophile [sic]. He also called me racist names (WOG).”

[46] In cross-examination the plaintiff agreed that he did not record in ex1 that the defendant, as opposed to Mr Kelly, called him a wog and asked if he had an Australian passport. He agreed that it “may well have been the case, yeah” that had that been said by the defendant he would have made a note of it. He then said that his evidence is that the defendant as well as Mr Kelly called him a wog but he couldn’t explain why he hadn’t recorded that in ex1 (T3-44,45).

[47] In cross-examination about what he said in ex20 he agreed that the sentence “He also called me racist names” refers to what Mr Kelly said. He seemed then to say that it was meant to, but didn’t, refer to both Mr Kelly and the defendant but agreed he hadn’t “obviously put it down in that structure” (T3-47).

[48] There are some differences between Mr Taylor’s evidence and the evidence of the plaintiff but I can see no reason to reject the evidence of Mr Taylor or doubt what he said. It supports the plaintiff in relevant respects. I cannot accept the submissions of Mr Roney (T4-47,49) that “it bears no resemblance at all to the case that’s put against” the defendant and that his version of events should be treated as unreliable. Witnesses to the same event do not invariably have the same recollection and give identical accounts of what was seen or heard. Mr Taylor knew both parties, and to my mind, was obviously independent and not partial towards the plaintiff. Just as Mr Taylor didn’t observe any physical movement by the defendant towards the plaintiff nor did he see or hear (that he can recall) Mr Kelly who was admittedly involved.

[49] I prefer Brent Taylor to Peter Kelly. The former was more independent, the latter seemed more partial towards the defendant and was influenced in his attitude to the

plaintiff by what the defendant had told him and as a result abused the plaintiff himself; in fact he was “incensed”. Mr Taylor was an acquaintance of the plaintiff, Mr Kelly a friend and drinking partner of the defendant. There is I consider, substance in Mr Anderson’s submission (ex28 paras 27-31) as to why the evidence of Mr Taylor should be preferred to that of Mr Kelly.

[50] I cannot accept Mr Roney’s submission (ex27, para 96) that “in almost every respect”, Mr Taylor’s evidence contradicted that of the plaintiff. Mr Taylor did not see and hear everything or if he did he can now only recall that which most attracted his attention. Mr Roney, conceded correctly (T6-65), that not everyone sees and hears everything or describes the same incident in the same way.

[51] I cannot accept the defendant’s evidence or Mr Kelly’s account of the defendant’s involvement in the incident. In cross-examination (T5-91) the defendant denied ever having used the words “paedophile” and “wog” and directing them towards the plaintiff. There was then this exchange between me and the defendant during cross-examination by Mr Anderson (T5-91):

“HIS HONOUR: You seemed to hesitate for a moment?-- No, well, when - he said - he used two words. He said - and then I had to think about the second one and then I thought, yeah, no, I haven't.

MR ANDERSON: Do you think that you might have called Mr Nowak a wog at some stage?-- No, I don't think - not that I can recall.”

[52] In relation to the incident on 7 February 2009 I accept the evidence of the plaintiff’s witnesses; they support each other and they support the plaintiff. I am satisfied that each of the defendant and his son accused the plaintiff of being a paedophile and that they each did so a number of times, certainly more than once.

[53] I believe the plaintiff’s father and Messrs Graham and Kermond in relation to this incident. They were consistent and supported each other. I cannot accept Mr Roney’s criticism of their evidence (ex27, para 17) as “at best vague, probably really poor” and unreliable. He conceded though a “common thread” existing through their evidence and that is clearly so.

[54] I do not believe the defendant in relation to this incident. His denial cannot stand against the evidence of these three witnesses. I do not consider the fact that Messrs

Graham and Kermond were friends of the plaintiff to have influenced their evidence.

[55] The defendant's son was not called to give evidence and I think I could infer from that that he would not have assisted the defendant but I do not have to go that far. The preponderance of the evidence in relation to this incident is overwhelmingly against the defendant (whose evidence I reject) and in favour of the plaintiff.

[56] This conclusion, in my view, reflects adversely on the defendant's credibility in general in relation to the RBSC incident and the remaining incidents in para 15(e). In addition the plaintiff's account of the surf club incident is, as I have said, supported by Mr Taylor.

[57] In relation to the incident on 24 November 2010 I prefer the evidence of the plaintiff; his credibility is better than the defendant's.

[58] I also prefer the plaintiff's account of the incident of 6 February 2010 rather than the defendant's denial. I do not, notwithstanding Mr Roney's submission to the contrary (ex27, para 186), consider it to be "inherently unreliable". In relation to Mrs Putland I think I am able to infer that had she given evidence she would not have assisted the defendant.

[59] As to the meeting on 16 February 2009, I think that what the defendant said to the plaintiff was probably said 3 or 4 times throughout the meeting (T2-52) at a normal conversational level when other people were talking; the plaintiff can't say whether others would have heard what the defendant said; he thought it could be heard but said he couldn't say whether in fact they did hear. Mr Boniface said he didn't hear what was said. I think it likely that the defendant and Mr Boniface are mistaken about the seating arrangements but if Mrs Brown (and possibly also Mr Brown) did sit between the plaintiff and the defendant what the defendant said was said past her/them and would clearly have been overheard. She was not called to give evidence, nor was Mr Brown.

[60] Mr Boniface also said (T6-38,39) that during the meeting Mrs Brown was calling the plaintiff a "toe rag" which he said was "not very complimentary" and "not very polite".

[61] In relation at least to Mrs Brown, I think I can also infer that evidence from her would not have assisted the defendant.

- [62] Mr Boniface, I consider, underplayed the tensions and animosity which existed at the units. He was with the others, ranged against the plaintiff and was, I consider, partial to the defendant rather than objective in his attitude towards the plaintiff. I think his evidence was coloured by his partiality rather than independence or objectivity. The plaintiff had upset his hitherto quiet and ordered world and he did not like it; to him the plaintiff was a disruptive element.
- [63] He denied that the application by the body corporate to the NSW Consumer, Trader and Tenancy Tribunal (see exs 9A & 9B) compared with the orders made (ex9A) suggested otherwise; I think it did.
- [64] He was clearly uncomfortable when questioned about the body corporate and its dealings with the plaintiff. After the plaintiff purchased his unit Mr Boniface said there were more and longer meetings basically to handle problems created by the plaintiff. He also seemed to have believed that the plaintiff interfered with the young girl (which I find he didn't) notwithstanding the plaintiff's denial of doing so. I felt he was reluctant to be entirely frank about what he may have heard the defendant say to the plaintiff at the meeting on 16 February 2009.
- [65] My impression from listening to him and watching him is that in any conflict or dispute between the plaintiff and the defendant he would support the defendant and that if an event was capable of being looked at or interpreted in two ways he would do so in a way to adverse to the plaintiff.
- [66] This included his evidence about reporting the incident involving the young girl to the police (see T6-50, line 35 – T6-52, line 10). This I consider, coloured the view he took of this issue at the meetings on 3 and 16 February 2009. He didn't believe the plaintiff when he said he owned unit 4, in fact I thought that generally he disbelieved anything the plaintiff said. He was clearly uncomfortable when his evidence was tested and when it was suggested that he and other owners regarded the plaintiff as at least an irritation and at worst undesirable.
- [67] I believe the other evidence given by the plaintiff's father. The fact that he has been helping the plaintiff with this litigation and funding it (see T3-20,21) does not cause me to doubt his evidence.
- [68] I do not believe the defendant at all. The preponderance of other evidence which I accept is against him. He had a set against the plaintiff for trying to photograph his

son living in his garage, set against the acrimonious, sometimes toxic relationship which existed at the units. He is also likely to have disbelieved the plaintiff's explanation for the cries made by the young girl. In this respect I also agree with Mr Anderson's submission (ex28, paras 21 and 23). The defendant's recollection sometimes seemed fairly selective. There is no doubt that he did not like the plaintiff and that an uncomfortable relationship had developed between them which even extended to the defendant's son Danny. Looked at objectively as to what the plaintiff was trying to achieve at the units (which clearly was, I consider, apparent to the defendant) the defendant over-reacted to the plaintiff's attempts to photograph his son living in the garage.

[69] The defendant struck me as a fairly confrontational person, someone who would be likely to initiate confrontations and pursue his own subjective view of matters even in an aggressive manner. He seemed a more assertive person than the plaintiff and someone who could easily behave in a domineering way. Events were taken out of context, meanings ascribed to events without knowledge of all the facts and adverse or unfavourable conclusions drawn on limited material.

[70] He said he accepted the plaintiff's explanation of why the young girl was screaming but I don't believe him; his subsequent behaviour is inconsistent with him doing so. To him the incident involving the girl was one with the attempt to photograph his son and prompted him to call the plaintiff a paedophile and a wog.

[71] He regarded the plaintiff as a disruptive element at the units and events were interpreted, privately and publicly, in such a way as to adversely reflect upon the plaintiff. The plaintiff was blamed for disturbing an existing way of doing things. The defendant was determined to embarrass and denigrate the plaintiff. To this end other unit owners seemed to have assisted and acquiesced. He wanted the plaintiff "out of the joint" more so after the attempt to photograph his son. What he did after that was designed to achieve that result. It may have been an unfortunate way for the plaintiff to obtain the evidence he wanted but the defendant's interpretation of it was out of all proportion and, in my view, became the catalyst for his campaign of defamatory statements against the plaintiff.

[72] The defendant appeared somewhat uncomfortable when cross examined about body corporate meetings and minutes and their connection to what was his obvious attempt to paint the plaintiff in a bad light. In my view he was clearly involved in

events surrounding the meetings and minutes although he was reluctant to admit as much. He was uncomfortable when his evidence about these matters was tested.

- [73] To the extent that the defendant's behaviour at the RBSC and in the later incidents was deliberately confrontational, as I find it was, it supports Mr Anderson's submission of bullying and harassment by the defendant; in fact Mr Kelly said the defendant started things at the RBSC.
- [74] I agree there clearly was a contextual background to the repeated reference to the plaintiff as a paedophile by the defendant.
- [75] Once it is accepted that the defendant called the plaintiff a paedophile at RBSC (as I do) it follows, in my view, that it is more probable than not that the incidents in para 15(e) occurred and that the defendant's evidence in respect of those should also be rejected. Likewise, first accepting that those incidents occurred make it more probable that the RBSC defamation occurred and that Mr Taylor's evidence should be preferred to Mr Kelly's. Mr Roney conceded (T6-61,62 & T6-6 lines 32-40) that the evidence could be approached in this way.
- [76] No reasons were advanced as to why I should not accept the evidence of Mr McGlenn. Mr Roney made no submissions about his evidence.
- [77] I think I can, as I have said, infer that the defendant's wife and Mrs Brown would not have assisted the defence case. No explanation has been provided as to why they were not called. The relationship between the defendant and his wife is clearly a close one and that between the defendant and Mrs Brown appears an amicable one. In the normal course of events the defendant could reasonably have been expected to call these persons as witnesses. The evidence of the defendant clearly contradicted that of the plaintiff on each occasion and on his case these persons could reasonably have been expected to have been able to give evidence bearing on this conflict. See *Cross on Evidence*, Aust Edition [1215].
- [78] The defence criticised the plaintiff's failure to call other witnesses particularly as to the RBSC incident, see ex27, para 126. I think this is most probably due to the reluctance of others to become involved than to the fact that no one heard the statements made. I am not disposed to criticise the plaintiff on this account or to draw an inference that other witnesses were not called because they would not have assisted his case. It was a crowded bar, the people the plaintiff was drinking with

were on the veranda and would not have heard and in any event he was not able to identify very many others who were in the bar at the time. He said he knew some faces, not necessarily names (T2-96). He said Mr Taylor was with Darryl Parkinson and someone called “Steve and his partner” both of whom he had “seen around before”; Parkinson was an acquaintance, someone he’d nod or say hi to, not someone he was on good terms with. He said Mr Taylor came up to him and said he’d “go to court on it”; Parkinson “didn’t put his hand up so I’ve left it at that”. He also said he was “too emotional, ashamed, felt so low” to ask Parkinson “whether he’d seen anything” (T2-97,98,99). He said he had a drink with Steve later and Steve said he “didn’t see it” (T2-100). He said he didn’t ask any of the others who were there because he “was just so embarrassed and so rattled about the whole thing” and he didn’t want to go around “promoting it and talking about the fact” (T2-101). He said he later spoke to management to get the “video footage” of the incident “but its all disappeared” (T2-101). Corey Brown, a club barman, was spoken to but he “apparently wasn’t there” at the time. He didn’t know who the other bar staff were and didn’t enquire. He said he left things up to his lawyers (T3-21,22,23,24). He said Steve McArthur (see Statement of Claim para 3(c)(ii)) was walking in front of him when he was kicked; he was “there at the beginning”; he couldn’t recall how long he was there (T3-30). He said (T3-32)

“From what I recall... I think he stopped for a split second or two and he looked back and saw the whole problem and he just took off. He didn’t want to know anything about it... He may or may not have heard what the defendant said.”

Mr McArthur’s evidence was not opened. The plaintiff said he was on good terms with him but hadn’t seen him for 3 or 4 months (T3-33,34). I accept the explanations of the plaintiff.

[79] I cannot accept Mr Roney’s submissions (ex27, paras 1 & 4) that the plaintiff’s evidence is so fundamentally lacking in credibility, full of contradiction, self serving statements and invention designed to provide a positive outcome for him, that he cannot be believed upon any relevant particular or that insofar as the effects of the defamatory statements are concerned the Plaintiff has grossly exaggerated their consequences.

[80] I am satisfied that at the RBSC the defendant in a loud voice called the plaintiff a paedophile four or five times after having first kicked him. The defendant behaved

in a bullying and harassing manner. I accept the evidence of Mr Kelly that the defendant was verbally aggressive towards the plaintiff and verbally attacked him. The plaintiff was unintentionally exaggerating when he said fifteen or thirty times but he was not lying rather he was most probably mistaken. It was his way of emphasising his perception of the seriousness of what was said. He was clearly surprised, shocked and upset by what was said and it seemed to him like it was said many many times when in fact it probably wasn't said as many times as he thought. This was conceded by Mr Anderson (T6-88). I accept the plaintiff when he said time froze for him, he lost track of time. The incident could in fact have lasted a minute during which the defendant called him a paedophile every 10-15 seconds. Mr Roney acknowledged, when cross-examining Mr Taylor, "that time can be a strange thing in these situations" (T4-26).

[81] I am also satisfied (notwithstanding the plaintiff's notes (ex1)) that the defendant called the plaintiff a wog once at the same time and in the same way. Mr Kelly also called him a wog. The evidence does not suggest it was said by each more than once. The plaintiff heard it said by the defendant and Mr Kelly. Mr Kelly may have used the word first and the defendant then adopted it and used it himself. Mr Taylor didn't hear it but that was, I consider, because his concentration was on the word "paedophile" and his recollection is influenced by that fact. This is also understandable if it was only said once by the defendant and Mr Kelly. In ex 1, I think the plaintiff emphasised the more serious allegation made by the defendant but was also concerned to note what Mr Kelly said.

[82] I agree that the words used by the defendant – "you're a paedophile" and "you're a wog" were said of and concerning the plaintiff because at the time they were said they were directed by the defendant at the plaintiff and were understood by those who heard them to be about and concerning the plaintiff. There was no real dispute about this assuming the words were said, and I find they were.

[83] Those words were published to many patrons at the club; many would have heard them. About fifty patrons were in the bar at the time including Brent Taylor, and it was to them that the words were published. According to the plaintiff (T2-100) the "whole room were all standing there looking".

[84] The defendant is not a paedophile nor is he a wog in the sense which it was meant and understood. Mr Roney said on the first day of the trial that “no case was being advanced that the plaintiff is a paedophile” (T1-84).

[85] The primary defence (that the words complained of were not said) has not been made out; they were.

[86] The plaintiff relies upon the following imputations:

(a) that using the word “paedophile” in its natural and ordinary meaning meant and was understood to mean that the plaintiff was a paedophile; and

(b) that using the word “wog” in its natural and ordinary meaning meant and was understood to mean that the plaintiff had undesirable ethnic qualities.

[87] At the end, the defendant didn’t contend otherwise in relation to the word “paedophile”.

[88] In relation to the word “wog” the defence alleges (para 17(e)) that if said, it was not defamatory of the plaintiff, was trivial and no more than an insult. This appears to be the defence of triviality provided for in s.33 of the *Defamation Act 2005*:

“33 Defence of triviality

It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm.”

[89] In relation to this aspect of the case, the plaintiff does, contrary to the submission made in ex27, para 230(c), have a Mediterranean complexion and appearance. In the context in which the word “wog” was said, it was clearly meant in a derogatory, insulting and offensive way. The plaintiff was being denigrated for the way he looked. It was not meant in a literary artistic, colloquial, harmless or jocular way (see ex27, para223). The defendant was certainly not joking at this time. It was also used in the context of other statements by the defendant that the plaintiff was a paedophile. The word was said because of the way the plaintiff looked and it meant and was understood to mean, that the plaintiff has undesirable ethnic qualities.

[90] The circumstances in which the word was used – crowded bar, public place, shouted angrily and aggressively in combination with the repeated allegations that the

plaintiff was a paedophile – were such that the plaintiff was in fact likely to sustain harm. The defendant has not proved to the contrary. In these circumstances it is not a “trivial defamation” e.g. a “slightly defamatory statement made in private circumstances to a limited number of persons with jocular effect”. Not everyone in the bar would have known the plaintiff and have been “able themselves to make a judgment on their own knowledge as to the likelihood that there was any substance in the imputation conveyed”. The use of the word in the circumstances was “prone to cause harm”. See *Jones v Sutton* (2004) 61 NSWLR 614 and *Doelle v Bedley* [2007] QDC 134, referred to in ex27, paras 231, 232. In fact, I find, the defendant intended to publicly humiliate and denigrate the plaintiff. There is no evidence that the “pre-existing hostility” between the plaintiff and the defendant was known to anyone in the bar other than Mr Kelly.

[91] Mr Taylor said the RBSC incident “was all a bit obnoxious” and he was “quite disgusted” in what was happening” (T4-67).

[92] The imputations relied on, for both words, arise from the natural and ordinary meaning of the words interpreted objectively as understood by the ordinary reasonable listener with general knowledge or experience of worldly affairs forming a general impression of the meaning from the words used (see ex28, para 38).

[93] I am satisfied also that the words used, the way they were said and the imputations relied on, are defamatory of the plaintiff and were likely to injure the plaintiff’s reputation and to cause those to whom the words were published and any person to whom the words were subsequently published to shun or avoid or ridicule or despise him.

[94] I am also satisfied that the words having been said at RBSC on a busy night, and because people known to the plaintiff and defendant - people within their immediate community - were there, that it is probable that the words and their imputations would be further published. See further para [125].

[95] The defamatory statements were made in the context of the surf community of which the plaintiff is a part and played a prominent role, socially and professionally. He was known by many people at the RBSC.

[96] I am also satisfied that each of the incidents constituting the “hate campaign” occurred.

Damages

- [97] The plaintiff alleges (Amended Statement of Claim, para 12) that by reason of the words used he has:
- (a) been injured in his reputation
 - (b) suffered a lowered esteem within his community
 - (c) suffered mental anguish, distress and embarrassment
 - (d) been injured in his business reputation
 - (e) suffered and/or is likely to suffer financial loss
- [98] In relation to (e) the plaintiff is not relying on any quantifiable economic loss rather his case is that the words used caused his ability to function as a financial advisor to suffer because of the stress the publication of the words caused to him. The “real significance” of evidence of how his business was affected “is that it supports a conclusion that the plaintiff was genuinely distressed by what was said about him” to use the words of McGill SC, DCJ in *Bui v Huynh* [2011] QDC 239 at para [62]. The evidence is said to relate to the plaintiff’s reputation and general compensatory damages (see T1-18).
- [99] The plaintiff is a 38 year old financial advisor (insurance of various sorts, income protection, and superannuation). He has been a financial advisor since 2000. He is an associate director of his father’s company, Joe Nowak Insurance Agencies Pty Ltd, trading as Joe Nowak Financial Services Group (for more details see his father’s evidence at T3-14,15,16 and T4-56,57,58,59). He joined his father’s business in 2002.
- [100] He has been involved in the North Kirra Surf Club all his life. The RBSC of which he has been a member for five years or so, is a source of business for him. Surfers, board riders, professional surfers including a former world surf champion are clients. He provides financial advice to them. He lives about 300 metres from the RBSC. He is well known in the surfing community. He has friends at RBSC. He frequented the club at least twice a month on Friday after work. He would drink with neighbours, other people he knew, friends and surfers. As a result of what the defendant did he has not renewed his membership; he didn’t want to go there.
- [101] During surfing carnivals he would attend RBSC and do a lot of networking and promotion of his business. His clients associate there and their family and friends drink there. Many people he knows in the surfing community go there. He has

many clients who go to the club. His personal appearance, integrity and reputation and personal contact with clients is important to him and his business. About a quarter of his clients are involved in the surfing and surf club community, including surfboard shapers. He has about 200 individual clients. He maintained regular contact with them. 100 - 125 of his clients are located at the southern Gold Coast. He considered himself to be a happy, successful and respected person. Mr Taylor described him as "a familiar face around RBSC" (T4-5).

[102] Mr Taylor said the plaintiff was "respected within the Surf Club and the surfing community; he's of good character and he has a good reputation at the club" (T4-15). He said in cross-examination (T4-18,19):

"It's right to say, isn't it, that you, in fact, have no knowledge, based on anything you've heard said by others in or about this surf club, as to how they regard Mr - or how they regarded Mr Nowak prior to this incident?-- No, I wouldn't say - I'd say that's incorrect because, you know, there's always - people often comment on people at the club. You know, like-----

Well, people at the club didn't say, "I think Mr Nowak's a respectable person.", did they?-- Well, not directly, no.

All right?-- Indirectly, yes.

And what is an example of something that you heard said about him that illustrates indirectly that he's a respected person?-- Oh, just things that may come out of someone's mouth, like, "Oh, there's Joey. He's a good bloke." You know.

Right. So a statement like, "He's a good bloke."-----?—

Yeah.

-----demonstrates respect? Anything else you can think of that you heard anyone say, either directly or indirectly, suggesting that he was a respected person?-- Well, I just - I know he's respected. I don't have to be told that. I can see that with the way that people treat Joe at the club. You don't have to get told by someone. You know, you can understand when someone is respected without anyone telling you.

Yes, but, you see, Mr Taylor, what I'm asking you is specifically directed to anything you've heard said, and we'll come to the

observations that you made in a moment, but let's deal first with anything you heard said about him by others in or about this surf club?-- I've just always heard-----

Apart from the fact that he's a good bloke?-- Yeah, come from the crew down there that he's a good bloke.

So that's the extent of what you've heard said about him?--

Yeah.

Now, what specifically then did you see in the behaviour of others which led you to the conclusion that the plaintiff was a person of good character and a person who was respected?-- Just in the general – the general feel of the mates we share a friendship with. I've never heard anyone say anything bad about Mr Nowak. Everyone's always - always talked to him. I don't know of anyone that holds any hostility towards him.

So no one's ever said anything bad about him and no one's been hostile?-- Not that I've ever witnessed, no.”

- [103] The plaintiff's father said the plaintiff “had a very good name” at RBSC (T4-60); his reputation was a credit to him. There was never a negative word about him (T4-63).
- [104] Dean McGlinn, a teacher, has known the plaintiff for 14 years and said people had “a lot of respect for him” (T5-4).
- [105] The plaintiff couldn't understand, couldn't believe what was going on (T1-34), what was happening when the defendant confronted him on 6 February. He was “disgusted”, it “was the biggest put down”, people in the bar were looking at him and he felt “totally inferior, so small, just like nothing, felt like dirt really” (T1-39). He was “embarrassed, ashamed, and felt so low, humiliated” (T2-99). “I was just so embarrassed and so rattled about the whole thing” (T2-101). He was “frightened and disgusted” (T2-104). He said he remembers the occasion “to this day. It haunts me every night” (T3-27). He “feels so insignificant, like he doesn't exist, physically ill”. He has “been sick and under massive amounts of strain”. He doesn't want to socialise or go to the RBSC which is a large area of his networking and this does impact on his business.

- [106] To him paedophiles are “disgusting people who abuse young children” and the word “wog” has a derogatory connotation for him “a put down” (T1-49,50).
- [107] He has had a bad back since April/May 2010 which could be from surfing but he thinks the “negative energy from this whole situation” has contributed to the decline of his back (T1-51).
- [108] The events have impacted on his approach in his business life. His business involved interaction with individual clients including surfers. His mental state “hasn’t been as positive through this whole ordeal and the continued harassment has brought me down so it makes it difficult to sell if you’re not really happy and friendly with people and so forth. If you’re a bit negative how are you meant to get out there and sell to someone” (T1-53). His business involves “a lot of networking, word of mouth” through his current client base (T1-53). The statements made by the defendant have affected him “mentally and physically” and had an effect “on the business without a doubt” (T3-17). He regarded himself as a very good salesman, with a popular following in the community (T2-9), a person who conducted his affairs “confidently and strongly” (T2-10).
- [109] The “triviality defence” degrades him even further; it puts him further down. It “says basically” that what he is saying “is a load of crap” (T1-54). Until Mr Roney’s address on 8 September 2011 the defendant was still relying on this defence for both of the words “paedophile” and “wog”. It was only during his address that Mr Roney abandoned the defence so far as it related to the word “paedophile”. It was maintained strenuously in relation to the word “wog”. This has aggravated the plaintiff’s damages.
- [110] The denial by the defendant that he called him a paedophile “disgusts him”. He “can’t believe he’d say that... I’d like to see closure and move forward in my life. I’ve had enough of it. It’s been going on for too long. It continues to go on” (T1-54).
- [111] After, he didn’t feel comfortable going to the RBSC so he didn’t use it very much (T2-73).
- [112] I cannot accept Mr Roney’s submission (ex27, paras 4, 11, 127) that “the plaintiff has grossly exaggerated the consequences of the matters said to him”. In my view he hasn’t.

- [113] Mr Taylor said the plaintiff was “quite, very unsettled”, “disturbed”, “a bit shell-shocked” by the defendant’s statements (T4-13,14,15).
- [114] The plaintiff’s father observed him to be “stressed out”; once he said he felt like going to the top of Point Danger and jumping off (T4-70). His work suffered badly, it was down (T4-71).
- [115] His father became very concerned for him; he was stressed out, his back seized up and he couldn’t surf for 10 months. “The stress put him into spasms”; sometimes he couldn’t drive”; “it was a stressful time” (T4-71). Mr Nowak snr attributed these physical symptoms to stress; “he was stressed out with the situation” (T4-88,89); he was “totally freaked out” about being called a paedophile (T4-75).
- [116] Mr McGlenn said the plaintiff was “quite taken aback” being called a paedophile; “he appeared quite stressed and quite dumfounded”. He could clearly see “it was playing on his mind” (T5-5); he was “definitely stressed”; his emotional state seemed to deteriorate; he was “a lot more stressed, less focussed” (T5-6). He became quite emotional on a couple of occasions; “it was definitely dominating him emotionally” (T5-6). Relations between them “really dropped off on the social scale”; he didn’t seem “to want to be around anybody” (T5-7); he became “more distant” (T5-9). Towards the end of 2009 Mr McGlenn “got the feeling it was starting to take its toll” on the plaintiff (T5-9). He could see that “right from when he first spoke about it, he was quite concerned about it and emotional” (T5-9). He said in cross-examination (T5-10):
- “But the point at which he was distant and his focus had changed and he was being emotional, that was many months after the incident-----
?-- I wouldn't say many months.
-----when he first mentioned it?-- I wouldn't say many months, but it was a gradual build-up, I believe so - I could notice the change sort of fairly straight away, but it was more intense and I got a bit more concerned as the months wore on.”
- [117] The “hate campaign” incidents also aggravated his hurt. The incident on 7 February 2009 was upsetting for him (T3-58). The incident on 16 February 2009 “put me down. I felt like dirt. I was disgusted”. The “same feelings” from the RBSC “came back and it just re-enforced all of those” (T1-43). When asked about the impact on him of the statements made on 6 February 2010 he broke down and an adjournment

was necessary for him to compose himself (T1-48). The statements were “offensive” to him (T2-52).

“You’re a paedophile” – “paedophile”

[118] This is a most serious allegation to make against a person. In the present case it was hurtful, cruel, persistent and prolonged. It was serious defamation. It involved the imputation that the plaintiff was guilty of serious criminal conduct. The plaintiff has suffered significant personal distress and hurt and his reputation has suffered.

[119] The defendant admitted that such an accusation was “vile” and “terrible” but was reluctant to admit that it could damage a person’s reputation. He gave the following evidence in cross-examination (T5-79,80):

“Do you believe Mr Nowak is a paedophile?-- No.

It truly is a vile accusation to make of a young man, isn't it-----?-- It is.

-----to call him, particularly in an open circumstance, a paedophile?-- Yeah, that is terrible.

Mr Putland, your view is, isn't it, that to call somebody a paedophile is extremely damaging to their reputation?-- My view is?

Mmm?-- I wouldn't - I don't know - is that - I wouldn't have a clue.

It stands to reason, doesn't it, Mr Putland, that if you call someone a paedophile, unless they are a paedophile, you're doing a whole lot of damage to their reputation-----?-- You could be, potentially you could be.

And that was how the question was originally framed, that it was potentially very damaging, the qualification being if they are a paedophile you probably haven't hurt them very much, but to someone who is not a paedophile there are few worse things that can be said about them?-- That's right.

Especially for a young man?-- Correct.

And, equally, it's likely to be extremely hurtful to that person?-- Likely.”

[120] Notwithstanding this evidence Mr Roney contended (T6-82) that this is not a concession on the part of the defendant, that “it’s a very serious allegation to make against someone”. I am satisfied that it is a very serious allegation to make against

someone who is not a paedophile and who the maker of the statement knows is not a paedophile.

[121] There is also this passage in the evidence of the defendant (T5-59):

“You'd accept though that there's a difference between something not being right and something being fraudulent; you'd accept that, don't you?-- Yeah. They're quite different, and that fraudulent is a very strong term?-- Yeah. A lot like paedophile, that's a strong term also, isn't it?-- It is. It oughtn't be lightly used?-- Mmm. Sorry, I just need you to give an audible response?-- Yes.”

[122] Damages are to bear an appropriate and rational relationship to the harm sustained by the plaintiff (s.35(1)) and may include an award of aggravated damages.

[123] None of the s.38 factors in mitigation apply here. No claim is made in relation to malice under s.36.

[124] The purpose served by an award of damages include “consolation for the personal distress and hurt caused by the publication, reparation for the harm done to the plaintiff’s reputation and vindication of the plaintiff’s reputation” (see *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-61 and *Hocken v Morris* (2011) QDC 115 at [47]). The gravity of the statements and the social standing of the parties are also relevant considerations.

[125] A damages award should also reflect the fact that the defamation may spread, as if along a grapevine, and reappear at other places unknown to and unheard of by the plaintiff, see *Crampton v Nugawela* (1996) 41 NSWLR 176 and ex28, para 43. I cannot accept Mr Roney’s submission (T6-84,85) that it would be “speculation only” to find the likelihood here, as I do, of a whispering or grapevine effect of the defamatory statements. The statements were of such a nature, said loudly and aggressively in a public club bar that it would be extremely surprising if they and the incident were not later repeated, more so as the plaintiff was well known at the club and the defendant was the President of the supporters club. Mr Kelly was the Vice-President of the supporters club and also the club’s grievance officer (T5-24).

[126] I am satisfied that the plaintiff has a very good reputation and that he was genuinely and significantly distressed by the statements made by the defendant by far the most serious of which were the repeated statements that he was a paedophile. Statements to this effect affected him the most and much more than the once stated statement that he was a “wog”. I am satisfied that he is still adversely affected by the statements and that was obvious when he was giving evidence. His health and reputation have suffered. As Samios DCJ said in *Atholwood v Barrett* [2004] QDC 505 at [22]

“...to be called a paedophile is one of the worst possible things that could be said about someone if it were untrue. I accept that it is one of those statements which, despite denial, may have a tendency to persist and leave a lingering and permanent mark on a person’s reputation. I accept it is extremely difficult, if not impossible, to dispel this.”

[127] Mr Roney conceded only (T6-84), that describing someone as a paedophile in a public place is “a matter that’s quite serious”. He denied any damage to the plaintiff’s reputation and submitted that the plaintiff’s case (if any) was limited to the claim that he was hurt and humiliated and became a recluse and resorted to cocaine (T6-81).

[128] Aggravated damages are to truly compensate for the relevant harm caused to the plaintiff. The defendant’s conduct must be “unjustifiable, improper or lacking in bona fides”. The conduct of the defendant which will increase the harm caused by the defendant’s publication will include a failure to apologise and include the conduct of the defendant right up to the moment of judgment. (See *Haertach v Channel 9 Pty Ltd* [2010] NSW SC 182 and *Hocken v Morris* supra at [59]. I am satisfied that more than a sufficient basis for an award of aggravated damages has been established here. The conduct of the defendant has been “unjustifiable, improper or lacking in bona fides”.

[129] The defence here was conducted in a way which clearly upset the plaintiff, see para [130]. The whole conduct of the defendant in relation to the proceeding can be taken into account in assessing damages, see *Bui v Huynh* supra at [65].

[130] The defendant’s

- statements that the plaintiff was a paedophile when he knew that the plaintiff was not a paedophile
- his refusal to apologise
- his repetition of the “paedophile” statements in the “hate campaign” incidents (again knowing them to be untrue) (in one case before 3 other people, in another before his wife and in another, perhaps before others at the meeting)
- the contention (ex27, para 182) that even if it be accepted the plaintiff was called a paedophile on 7 February 2009 that “is a matter of small moment only”
- his continuing contention until addresses on 8 September 2011 (see T6-72) that if made, the allegation that the plaintiff was a paedophile was trivial and not likely to injure his reputation or be likely to cause him hurt and was an insult only
- his continuing contention (see the Defence, ex27, s.22 and T6-73,74) that the allegation that the plaintiff was a wog is trivial and not likely to injure his reputation or be likely to cause him hurt and was an insult only
- his continuing contention that the plaintiff is lying about the RBSC and the “hate campaign” incidents
- his contention that the plaintiff’s witnesses to the incident of 7 February 2009 are lying or mistaken (plaintiff’s father, Messrs Graham and Kermond) and that Mr Taylor is mistaken about what he heard at RBSC
- his refusal to admit in the Defence that both the plaintiff and the defendant were at RBSC between approximately 7pm and 8pm on 6 February 2009
- his contention that the statements that the plaintiff was a paedophile were not capable of meaning that the plaintiff was a paedophile
- his continuing denial of making any of the statements complained of by the plaintiff
- his refusal (through his counsel) to concede (T6-82) that it is a very serious allegation to call someone a paedophile

- the obvious reluctance to accept in cross-examination of Mr Taylor (T4-18,19) that the plaintiff was of good character and a person who was respected at RBSC
- his denial, through his counsel, until addresses, that any damage had been caused to the plaintiff's reputation by the statements, and
- his reluctance to admit that accusing a person of being a paedophile when it was known that he wasn't may be damaging to that person's reputation.

have clearly aggravated the hurt suffered by the plaintiff and the plaintiff is entitled to significant aggravated damages for those reasons. The plaintiff's Claim and Statement of Claim were filed on 5 February 2010 and later amended to include the incident which occurred on 6 February 2010. The "hate campaign" stopped after 6 February 2010.

[131] In *Atholwood v Barrett*, supra, the defamatory paedophile statements were made to A on two occasions, B on one occasion and to C on three occasions. The plaintiff was well regarded in the industry in which he worked and had an excellent reputation prior to being defamed by the defendant. The plaintiff found discussing the allegations very distressing and he also found it increasingly difficult to regain his concentration and continue working. At trial he was still being adversely affected by the defamatory statements. Psychological evidence established that he was suffering reactive depression as a result of the statements, "the rumours this contributed to and word getting back to him of the rumours." Compensatory damages for the defamatory statements as a whole relating to paedophilia were assessed at \$100,000.

[132] Mr Anderson submitted (T6-95) that "probably the same amount" should be awarded for each of compensatory and aggravated damages but I don't think that takes sufficient account of the very public nature of the defamatory statements made at RBSC to the plaintiff's social and professional community by someone who was also a member of that social community and President of the RBSC supporters club.

Award

[133] I assess the plaintiff's compensatory damages at \$80,000 and aggravated damages at \$70,000.

[134] The plaintiff is also entitled to interest at 2% from 6 February 2009 until judgment.

Judgment

[135] I give judgment for the plaintiff against the defendant for \$150,000 together with interest at 2% from 6 February 2009 until judgment.

[136] I order the defendant to pay the plaintiff's costs of and incidental to the proceeding to be assessed on the standard basis unless agreed.